

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

---

Docket Number 14-870

---

SHAWN THOMAS MOORE  
Plaintiff

vs.

SUSEN ROSSINO, M.D.  
Defendant.

---

**FILED**

SEP 15 2016

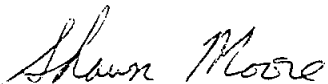
CLERK U.S. DISTRICT COURT  
WEST. DIST. OF PENNSYLVANIA

---

APPEAL OF THE NON-DISPOSITIVE ORDER DATED AUGUST 26, 2016  
BY THE HONORABLE MAGISTRATE MAUREEN P. KELLY  
IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF PENNSYLVANIA

---

Respectfully submitted,

  
\_\_\_\_\_

Shawn Moore, Pro-Se

S.C.I.P.

P.O. Box 99991

Pittsburgh, PA 15233

TABLE OF CONTENTS

I.	Table of Contents . . . . .	i
II.	Table of Authorities . . . . .	ii
III.	Statement of the Issues . . . . .	1
	A. Did the Magistrate, in allowing Defendants Motion to Compel Discovery, abuse her discretion and allow discovery that constitutes a fishing expedition?	
	B. Did the Magistrate, in allowing Defendants Motion to Compel Discovery, make errors of law and fact, abusing her discretion?	
IV.	Statement of the Case . . . . .	1
V.	Facts In Support . . . . .	2
VI.	Summary of Argument . . . . .	7
VII.	Argument . . . . .	7
VIII.	Conclusion . . . . .	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Chimenti, Et Al., vs. Pennsylvania Dept. of Corrections Civil Action No.15-3333.....	6
In Re Cendant Corp Sec. Litig. 343 F.3d 658, 661-62 (3d Cir. 2003).....	8
McConnell vs. Canadian Pacific Realty Co. 280 F.R.D. 188, 192 (M.D.Pa. 2011).....	8
Morrison vs. Philadelphia Housing Authority 203 F.R.D. 195, 196 (E.D.Pa. 2001).....	8
Mumia Abu-Jamal vs. John Kerestes Civil Action No. 15-0967.....	6
Provine vs. Provine Ambulatory Health Services 2014 WL 47771, at *2 (M.D.Pa Jan 6, 2014).....	7
Ohntrup vs. Makina Ve Kimya Endustrisi Kurumu 760 F.3d 290, 296 (3d Cir. 2014).....	8
 <u>STATUTES</u>	
42 U.S.C. § 1983 .....	1
Fed. R. Civ. P., Rule 7(b)(1)(B).....	4,8
Fed. R. Civ. P., Rule 26(b)(1).....	7
Fed. R. Civ. P., Rule 37.....	3,7
Fed. R. Civ. P., Rule 37(a)(1).....	8
Fed. R. Civ. P., Rule 37(a)(3).....	8
Fed. R. Civ. P., Rule 72(a).....	1

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SHAWN THOMAS MOORE,	:	No.2:14-cv-00870-DSC-MPK
Plaintiff,	:	Civil Action - Law
	:	Hon. David S. Cercone
v.	:	Magistrate J. Maureen P. Kelly
	:	JURY TRIAL DEMANDED
SUSEN ROSSINO, M.D.,	:	
Defendant.	:	APPEAL OF NON-DISPOSITIVE ORDER

**APPEAL OF NON-DISPOSITIVE ORDER OF MAGISTRATE JUDGE**

NOW COMES plaintiff, Shawn Moore, in the above entitled matter, and files this Appeal of a Non-Dispositive Order of Magistrate Judge, Maureen P. Kelly, pursuant to Fed.R.C.P. Rule 72(a).

**STATEMENT OF ISSUES**

A. Did the Magistrate, in allowing Defendants Motion to Compel Discovery, abuse her discretion and allow discovery that constitutes a fishing expedition.

B. Did the Magistrate, in allowing Defendants Motion to Compel Discovery, make errors of law and fact, abusing heral discretion, contrary to the Rules of Procedure and Law.

**STATEMENT OF THE CASE**

This is a case in which the plaintiff alleges a violation of his Fourteenth Amendment Right to Due Process pursuant to 42 U.S.C. § 1983. Plaintiff alleges that he received inadequate medical care while incarcerated at the Lawrence County Jail. Plaintiff has since been transferred to a state correctional facility at Pittsburgh. Discovery is scheduled to be completed on October 3, 2016, per Fourth Case Management Order [ECF 116]. Defendants filed Motion to Compel Discovery that was not in accord with the Rules of Civil Procedure and sought irrelevant discovery in a fishing expedition. Moreover, defendants then filed

her Reply to Plaintiff's Opposition in which they raised for the first time issues of relevancy that plaintiff was not allowed to counter as Magistrate, Maureen P. Kelly, made her decision the following day using arguments made in defendant's Reply. The Reply and Order were based on complete falsehoods, errors of fact, and theories of relevancy not articulated in their Motion to Compel, with the fundamental unfairness of not allowing the plaintiff to respond to their Reply. Plaintiff states the following facts in support of his appeal to reverse and or modify the Order of the Court:

**FACTS IN SUPPORT**

1. On August 10, 2016, defendant Rossino filed a Motion to Compel Discovery [ECF 103]. (See attached exhibit "P.1")

2. Defendants Motion, Paragraph 4, states in part:

"In order to obtain Plaintiff's complete treatment records, On June 9, 2016, the undersigned served a Second Request for Production of Documents Directed to Plaintiff requesting he sign medical authorizations allowing this Defendant to obtain records from those two institutions." (Ex.P.1)

3. Defendants attorney then states in Paragraph 5 :

"Plaintiff has neither responded nor objected to this Request and his response is well past due."

4. This was the basis for his Motion to Compel as he articulated nothing further, yet, defendant's Reply states that plaintiff sent his objections August 18, 2016, ten days after motion to compel was filed. Not true or accurate. Plaintiff sent objections to Request for Admissions on August 18, unrelated to motion. (EX."P.8")

5. In any event, the plaintiff sent his objection to the request for medical records on July 7, 2016. (See Exhibit "P.9")

6. The Defendant never tried to confer with the plaintiff to resolve the issue of discovery before seeking an order from the

the court.

7. Defendant never certified to the court the he had made a good faith effort to resolve the issue without court order. Both of these are in violation of the rules of procedure.

8. Defendant only claimed later, in his Reply, that "... conferring with the opposing party in this case is nearly impossible given that Mr. Moore is incarcerated."

9. Plaintiff has had numerous issues with defendants not responding to requests for discovery, so much so, that they never responded to a set of interrogatories in a timely manner, yet, every single time, plaintiff managed to comply with the rules of procedure and make good faith efforts to resolve without court intervention.

10. The defendant in this case, has routinely ignored mandatory language in the rules, put forth absolute fictions of fact, and then, even worse, the magistrate has accommodated him unfairly to the plaintiff, of which I shall show.

11. On approximately August 15, 2016, plaintiff filed his Response in Opposition to Defendants Motion to Compel. (Please See attached as Ex. "P.2")

12. In his Response, plaintiff explained that he had sent defendant a timely response, and, defendant would have known that had he complied with the mandatory language in Fed R.C.P. Rule 37.

13. On August 25, 2016, defendant Rossino filed a "REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO COMPEL DISCOVERY". (See Ex. "P.3", [ECF 112])

14. Defendant Rossino, in her Reply, raised for the first time, issues that were not in her Motion, which is contrary to

Fed.R.C.P., Rule 7(b)(1)(B), which states in part:

The motion must: "state with particularity the grounds for seeking the order..."

15. The Reply attempted post-hoc, to shift it's reason for the reason to compel.

16. The reasons stated in the Reply were flat out non-truths.

17. The Reply stated plaintiff's objections were inappropriate.

18. Defendants Reply, Paragraph 6, states the following non-truth: "In particular, Plaintiff claims that apparently Dr. Rossino did not properly treat what he claims was liver pain. Plaintiff had a number of other chronic conditions which included gastrointestinal problems and apparently Crohn's disease (the latter was never reported to Dr. Rossino)."

19. This staement is absolutely not true as the following Exhibits show, not only did plaintiff report his Crohn's Disease upon entry to the jail, Dr. Rossino herself notes this in plaintiff's medical records. (See Ex."P.4, pg.3 of 8" and Ex."P.5, pg.1 of 3")

20. Any gastrointestinal issue plaintiff had was known by defendant Rossino, and was diagnosed.

21. Defendants Reply, Paragraph 7, states the following:

"Defendant is entitled to discover what other abdominal, gastrointestinal or other medical problems Plaintiff has since been diagnosed with (that may have existed at the time of Dr. Rossino's treatment) which could have been confused by Plaintiff as "liver, pain." In other words, if there was some other unknown cause for his alleged pain which was unknown to Dr. Rossino, Plaintiff could not recover for the claims he has asserted." (Ex."P.3")

22. It is established through the foregoing exhibits that defendant Rossino was aware of plaintiff's Crohn's Disease.

23. To allow defendant Rossino to "see" if there are issues that had been unknown to her (which is untrue) constitutes a "fishing expedition" not allowed by the rules of discovery.

24. Defendants Reply further states, Paragraph 8,

"Accordingly, Defendants request for Plaintiff's subsequent medical files are reasonably calculated to lead to the discovery of admissable evidence,..."

25. Equally important to these statements being untrue as a basis for Compelling, they were not included in the Motion to Compel.

26. The Reply goes on to state additional untruths as a basis for Compelling Plaintiff's medical records.

27. Defendants Reply, Paragraph 9, states: "Furthermore, the medical records obtained in this case confirm that Plaintiff continually refused appropriate diagnostic procedure related to his hepatitis C."

28. Plaintiff vehemently denies this. Plaintiff never refused any procedure or diagnostic related to his Hepatitis C.

29. Defendants are referring to refusal forms that have falsified information and are misleading and untrue.

30. Most importantly, and this is information I have been trying to get defendants to answer through a series of interrogatories, of which the court initially denied, and that is the dates that Dr. Rossino was physically at the Lawrence County Jail, as these alleged refusals state that Dr. Rossino advised plaintiff of certain medical information, of which, she did not, because Dr. Rossino was not at the jail on these dates. Defendants objected stating this information was not relevant, yet it is the crux of their defense.

31. The refusals referred to by defendants are falsified information.

32. The Reply further states, Paragraphs 10 and 11, "Defendant is entitled to know if those refusals have continued."



and "In other words, even if Plaintiff claims that Dr. Rossino should have done more (which Dr. Rossino does not concede is a cognizable claim), his continued pattern of refusal of treatment is relevant to show that Plaintiff would have refused any additional treatment offered by Dr. Rossino."

33. As plaintiff has stated, let defendants answer if Dr. Rossino was at the jail on the dates of these alleged refusals. Dr. Rossino was only at the Lawrence County Jail one day per week, which did not include dates alleged by defendant.

34. On August 26, 2016, one day after defendant Rossino filed her Reply to Plaintiff's Opposition, Magistrate Kelly, issued her Order Compelling Plaintiff to provide defendants with signed authorizations for plaintiff's entire medical file since having been in state custody. (See Exhibit "P.6", [ECF 113])

35. Magistrate Kelly's justifications for compelling plaintiff's medical records were based solely on a pot-hoc Reply, of which, had no basis in fact, in fact, quite contrary to the facts.

36. Moreover, this Order to Compel was granted one day after it was filed and did not afford the plaintiff the fair opportunity to refute what defendant erroneously portrayed as true. (Please see Ex. "P.6" [ECF 113])

37. In addition, plaintiff is preparing to file suit against the current providers of healthcare in the D.O.C. via a class action lawsuit initiated in the Eastern District of Pennsylvania NO.15-3333, CHIMENTI, ET AL. vs. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, for non-treatment of his Hepatitis C. There are other pending suits for the same in other District such as MUMIA ABU-JAMAL v. JOHN KERESTES, (M.D. 15-00967).

38. Plaintiff states that his medical records from the D.O.C. are unreliable (even though plaintiff swears there are no refusals

to be found) and that, just defendant Rossino has tried to portray with alleged self-serving refusals, D.O.C medical department is also suspect. (Please see EX. "P.7", detailing plaintiff's grievance history regarding medical care and lack thereof)

39. Lastly, allowing defendant Rossino access to my complete medical records based on nontruths set forth by defendants is an abuse of discretion, error of law, and constitutes a fishing expedition.

#### SUMMARY OF ARGUMENT

This Court should allow Plaintiff's Appeal of Non-Dispositive Order of Magistrate Kelly and reverse the Order Compelling Discovery because the Order was contrary to the facts and law, and denied the Plaintiff fundamental fairness.

#### ARGUMENT

- A. PLAINTIFF'S APPEAL SHOULD BE GRANTED AND ORDER TO COMPEL REVERSED BECAUSE IT ALLOWS DEFENDANT TO FISH FOR EVIDENCE
- B. PLAINTIFF'S APPEAL SHOULD BE GRANTED AND ORDER TO COMPEL REVERSED BECAUSE IT IS BASED ON ERRORS OF FACT, LAW, AND ABUSE OF DISCRETION

Pursuant to Fed. R. Civ. P. 26(b)(1), a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). While generally liberal, permissible discovery is not without limitations; it "should not serve as a fishing expedition." *Provine v. Ambulatory Health Services, Inc.*, No.13-cv-334, 2014 U.S. Dist. LEXIS 702, 2014 WL 47771, at \*2 (M.D. Pa. Jan.6, 2014).

Under Fed. R. Civ. P. 37, a party may move to compel discovery

when existing disclosures have been insufficient. Fed. R. Civ. P. 37(a)(3). The party moving to compel discovery bears the burden of proving the relevance of the requested information. *Morrison v Philadelphia Housing Authority*, 203 F.R.D. 195, 196 (E.D. Pa. 2001). Fed. R. Civ. P. 37(a)(1) states in part, that a motion to compel "...must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 7(b)(1)(B) states in part, that the motion must "state with particularity the grounds for seeking the order;" In the instant matter, defendants have done none of these. The motion was based on plaintiff's alleged failure to respond. Defendant never made any good faith attempt to confer with plaintiff before seeking court action. Moreover, defendants Reply was not a Motion and was based on facts to relevancy that were, and are, erroneous.

It is well established that the scope and conduct of discovery are within the sound discretion of the trial court. In *Re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003). "Rulings regarding the proper scope of discovery, and the extent to which discovery may be compelled, are matters consigned to the Court's discretion and judgment." *McConnell v. Canadian Pacific Realty Co.*, 280 F.R.D. 188, 192 (M.D. Pa. 2011). A court's decision regarding the conduct of discovery will be disturbed only upon a showing of an abuse of discretion. *Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*, 760 F.3d 290, 296 (3d Cir. 2014). The Magistrate's

Order to Compel was based on errors of fact, contrary to the Rules of Procedure; based on a "Reply" to plaintiff's Opposition to Motion to Compel rather than reasons that are supposed to be set out in the actual Motion to Compel; based on a Reply without plaintiff being given an opportunity to rebut the blatant inaccuracies of defense counsel, of which, the decision was given the very next day after the "Reply" was filed making sure plaintiff was denied fair process; based on a "Reply" that was almost entirely filled with statements that were entirely untrue; based on a Motion that did not comply with mandatory language in Rule 37; based ultimately, on what constitutes a fishing expedition because nothing attorney Shear said was true. So much so that it bears review.

(a) The Motion alleged plaintiff did not respond to his request for documents, specifically, signed authorizations for plaintiff's complete medical after leaving county jail. (Plaintiff responded timely on July 7, 2016.)

(b) The Motion to Compel did not contain a statement from defense counsel that he had made a good faith effort to obtain these documents without Court intervention. Nor did it contain a Certification to the same. (All contrary to the rules, if counsel had sent a simple letter stating he had not received my Answer I would have gladly re-sent it. Also, he could have then filed a Motion to Compel that was inline with his "Reply", albeit erroneous, to which the court would have had to have given me the opportunity to rebut the ridiculous statements made by defendants counsel.)

(c) After plaintiff filed his Opposition, Attorney, Brett C. Shear made the following false averments in his "Reply"

(1) He admits that he received plaintiff's objection to the authorization for complete medical file from after plaintiff was released from County Jail, but he says that he received it August 18, 2016, which is untrue. Plaintiff sent his "Objections to Requests for Admission" on August 18th, and his original objections were resent.

(2) He then offered that, "in any event, these objections do not resolve the Defendants Motion to Compel", which is also inaccurate because the sole basis for his Motion was that plaintiff had not responded, which, as I've stated, is untrue.

(3) Attorney Shear's next portrayal was that, while he did not confer with plaintiff before filing his Motion to Compel it was somehow okay because "conferring with the opposing party in this case is nearly impossible given that Mr. Moore is incarcerated". Attorney Shear has conferred with the plaintiff in this case countless times before by mail, just as plaintiff did several times when there were the numerous late response from defendants counsel regarding discovery, yet this time it was "nearly impossible" as if it were okay to tailor the rules because, in this instance, it did not suit defendants counsel.

(4) Next was the claim that Dr. Rossino was unaware that plaintiff had Crohn's Disease. The Medical Records clearly show that from the day plaintiff became incarcerated he made medical staff aware he had Crohn's and Dr. Rossino clearly notes this herself in plaintiff's medical records as found in plaintiff's Exhibits "P.4" and "P.5". He then alluded that plaintiff had "a number of other chronic conditions which included gastrointestinal problems". Plaintiff's Crohnic conditions include Asthma, Hepatitis C, Crohns' Disease, and Acid Reflux. All of which were diagnosed an known by defendant, Dr. Susen Rossino. Now, post-hoc, defendants counsel is trying to portray that there is some mystery gastrointestinal ailment that plaintiff may have confused with the pain he had in his LIVER.

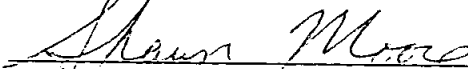
(5) Lastly, Attorney Shear claims that plaintiff signed refusals for treatment of his Hepatitis C. Plaintiff vehemently denies this. From the very outset of discovery, plaintiff has attempted numerous times to get defendant Rossino to answer whether or not she was at the county jail on certain dates that these alleged refusals refer to. Defendants counsel has refused to answer because he knows that to answer these requests would put into question, and absolutely refute, what it is that these refusals allege. Moreover, and most important, when plaintiff filed his Motion to Compel these answers based on the fact that defendants waived their right to object to answering because they did not respond timely, Magistrate Kelly ruled in favor of defendants saying that plaintiff had failed to prove the relevancy of the requests when he should not have had to because defendants waived their right to object. Yet now, defendants counsel is trying to use these exact dates, which he had previously claimed were not relevant in his Opposition to plaintiff's Motion to Conmpel, to prove that plaintiff had all sorts of refusals. With these decisions by Magistrate Kelly, it appears that defendants counsel can say just about anything and get a ruling in his favor.

CONCLUSION

This Court should reverse the Order of Court made on August 26, 2016, Compelling Plaintiff to provide signed authorizations for his complete medical records from after he left the county jail because the decision was an abuse of discretion, based on errors of fact and contrary to law. I would also ask that this court, should it not reverse the Order, that it Modify the Order to mandate Dr. Rossino to answer when she was physically at the jail for the timeframes plaintiff has requested in his interrogatories.

,Dated: September 12, 2016.

Respectfully submitted,



SHAWN MOORE, pro-se #LZ-9799  
S.C.I.P.

P.O. Box 99991

Pittsburgh, PA 15233